

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
)	
Business Data Services in an Internet)	WC Docket No. 16-143
Protocol Environment)	
)	
Special Access for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	

COMMENTS OF INCOMPAS

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INCOMPAS, on behalf of itself and its respective members, submits these comments in response to the Second Further Notice of Proposed Rulemaking (“*Second FNPRM*”) with respect to regulation of TDM interoffice transport services offered by price cap carriers.¹

I. INTRODUCTION AND SUMMARY

The Commission’s proposal to deregulate on a nationwide basis an important portion of the business data services (“BDS”) market has no basis in the record in this proceeding. If adopted, it would lead to price increases for businesses and consumers across the country and would undercut regulatory protections in areas that the Commission only recently determined lacked sufficient competition. Rather than rush to judgment and blindly eliminate pricing protections everywhere, the Commission should follow its own precedent and propose a

¹ *Business Data Services in an Internet Protocol Environment et al.*, Second Further Notice of Proposed Rulemaking, FCC 18-146, WC Docket No. 16-143 et al. (rel. Oct. 24, 2018) (“*Second FNPRM*”).

competitive market test that would deregulate only in areas “where competitive forces are able to ensure just and reasonable rates.”²

When the Commission deregulated the vast majority of the BDS market served by price cap LECs last year,³ it did so based on a record compiled from thousands of comments, months of careful economic statistical analyses from multiple experts and academics, and the largest data collection in Commission history. INCOMPAS continues to believe that the Commission fundamentally misinterpreted the data in the record and thus drew faulty conclusions on the state of competition in the markets for low bandwidth BDS, including those for DS1 and DS3 channel terminations. Nonetheless, there is no doubt that the Commission had the *capability* to form well-founded conclusions on the state of competition for channel terminations given the richness of the record and the robustness of the analyses. And while deeply flawed, the *BDS Order*’s competitive market test attempted to harness that data to apply channel termination regulations based on the competitiveness of individual geographic areas.

The same cannot be said for the transport services at issue. These services cover BDS circuit elements that provide “interoffice facilities ...between the serving wire center and the LEC end office serving the end user,”⁴ i.e., between two ILEC facilities. The record did not, and does not, contain data on the extent of competition by different transport service providers across a range of geographic markets, or on the barriers to and potential likelihood of competitive entry into those markets. The record also did not, and does not, contain data on network collocation

² *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, FCC 17-43, 32 FCC Rcd. 3459, 3462 ¶ 5 (2017) (“*BDS Order*”).

³ *See id.*

⁴ *Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, 14 FCC Rcd. 14221, 14227 ¶ 10 (1999).

facilities that would enable competitive providers to bypass incumbent end offices to deploy their own transport networks.

As discussed below, the portions of the record cited in the *Second FNPRM* to support the proposed nationwide deregulation are not relevant to analyzing the degree of actual competition for the transport routes that are actually the subject of current regulations. Moreover, because the Commission lacks transport service data at a geographically granular level, the claim that there are many competitive transport providers relies on a statistical sleight-of-hand that hides the vast differences in the competitive environments of large, dense urban business cores and smaller suburban or more rural areas. In contrast, the limited data on transport available in the record—those showing the commanding revenue share of ILECs for TDM services—indicate that there are at least large areas of the country with barely any competition. Other evidence in the record specifically on transport shows that ILECs charge significantly higher rates in areas where price caps have been eliminated, further indicating the lack of competition to discipline prices.

The Commission concluded in the *BDS Order* that some areas lack the prospect of competition such that price cap regulations are necessary to ensure just and reasonable prices for channel terminations. There is no reason, especially on this record, for the Commission to take the opposite approach for transport services in the same areas. Although the economics of transport service may differ from those of channel terminations, competition in both depends at a minimum on non-ILEC owned fiber, which the Commission concluded is not available in these areas. Any would-be competitive transport provider also must be collocated at and cross-connected to ILEC facilities, because, as the Commission found, there are no competitive alternatives to ILEC channel terminations in these markets. Eliminating price caps for transport

services, which are purchased together with, and are necessary for, channel terminations, in these non-competitive areas will lead to price increases for the end-to-end connection between the provider and the BDS end user, negating the protections that the Commission has determined are necessary.

INCOMPAS urges the Commission to take this opportunity to develop a factual record, conduct a proper market analysis, and propose a competitive market test that would enable the Commission to adopt appropriately balanced regulations. If done correctly, this approach would promote competition in markets where it is likely to emerge and would maintain the necessary protections in those markets where competition remains stubbornly absent. The record does not show that there is sufficient competition nationwide to ensure just and reasonable prices, and there is a certainty that deregulation would lead to price increases that would undermine the Commission's own protections in at least some markets. Against these harms, the public interest has little to gain from further deregulation. The Commission should not adopt the proposed nationwide deregulation of interoffice transport services.

II. THE RECORD DOES NOT SUPPORT NATIONWIDE DEREGULATION OF DS1 AND DS3 INTEROFFICE TRANSPORT SERVICES

The record in this proceeding shows that the markets for DS1 and DS3 interoffice transport are generally much like those for low bandwidth—at and below 50 Mbps—BDS: stubbornly concentrated and heavily dominated by incumbent local exchange carriers. The Commission nonetheless concluded, based on a deeply flawed competitive market analysis in the *BDS Order*, that the vast majority of counties with BDS demand had “competitive” markets for TDM channel terminations. Notwithstanding, the same record evidence cited by the Commission to support the competitive market test for channel terminations does not apply to the market for *interoffice* transport service, which has a geographic market that was not properly

defined in either the *BDS Order* or the *Second FNPRM*. The Commission thus should not rely on irrelevant information in the record cited by AT&T and other ILECs about the existence of competitive facilities near customer locations to sustain nationwide deregulation of transport services between ILEC end offices. Rather, the Commission should propose an appropriate test for DS1 and DS3 interoffice transport services that more accurately reflects the competitive realities for these services

A. There Is No Basis for Concluding that Markets for Interoffice Transport Are Competitive.

On the record before the Commission, there is no basis to find that markets for interoffice transport services are competitive nationwide. Prior analyses of the Commission's data collection indicate that ILECs' market power over DS1 and DS3 channel terminations, as a practical matter, frequently extends to interoffice transport needed to carry traffic from those channel terminations. In these non-competitive markets, the only location where a transport provider could connect to the ILEC channel termination serving a given end user is in the ILEC end office. Unless a competitive provider is collocated in that particular end office, the ILEC will also have the only transport facilities that reach that channel termination, and thus able to receive traffic handed off from the end user. Even in channel termination markets deemed "competitive," the average distances between non-ILEC owned facilities and end-user locations cited in the *Second FNPRM* is still irrelevant. The relevant distance is rather how far a competitive provider would need to extend its network to reach the traffic hand-off point, whether at an ILEC end office or some other location, and not the end user's location. There is no evidence in the record of either the number of traffic hand-off points with collocated competitive providers, or even evidence of the likelihood of competitive entry based on proximity of competitive facilities to such points. By stumbling on this basic step of geographic

market definition, the *Second FNPRM* also fails to analyze the barriers to entry for potential competitive providers of interoffice transport, and thus represents a fatally incomplete market analysis that cannot be the basis for finding competitive markets nationwide.

1. The Record Reveals Evidence of Market Power in Transport Services Between ILEC End Offices.

The Commission has limited evidence in the BDS proceeding on interoffice transport, but it has enough to reveal ILEC market power. First, the analysis performed by Dr. Marc Rysman, the Commission's independent expert economist in the proceeding, included revenue data on both channel terminations and interoffice transport and found that ILECs exercise market power for DS1 and DS3 services.⁵ Dr. Rysman's regressions show that ILEC prices are higher where there are no facilities-based competitors connected to any building in the same census block,⁶ indicating the presence of market power.⁷ Additional analysis by other economists that participated in the proceeding likewise found evidence of ILEC market power over the full BDS circuit, including channel termination and transport.⁸ ILECs' own statements support the economists' approach. AT&T stated that its BDS "[c]ustomers typically purchase channel

⁵ See Dr. Marc Rysman, *Empirics of Business Data Services* 3 (rev. June 2016) ("Rysman Rev. White Paper"), https://apps.fcc.gov/edocs_public/attachmatch/DOC-340040A6.pdf (finding evidence of ILEC market power).

⁶ See *id.* at 21-22. The distances over which a competitive provider would need to extend its facilities to reach another customer in the same census block is significantly shorter than the half-mile distance in the Commission's competitive market test. As Dr. Rysman noted, "a square median-sized census block would have sides that were 0.16 miles long." *Id.* at 11.

⁷ *Id.* at 19 ("[I]f more competition reduces prices, it tells us that markets without competition exhibit market power.").

⁸ See Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶ 5, WC Docket Nos. 16-143 et al. (filed Aug. 9, 2016); Declaration of William P. Zarakas and Jeremy A. Verlinda at Appendix. C, attached as Ex. D to Comments of Sprint Corporation, WC Docket Nos. 16-143 et al. (filed June 28, 2016).

terminations together with mileage or multiplexing.”⁹ Indeed, AT&T argued that the Commission should analyze its foregone revenue from a cancelled channel termination by averaging “revenues from channel terminations, mileage, and multiplexing” together.¹⁰

Second, ILECs’ pricing behavior provides direct evidence of the ILECs’ ability to charge supracompetitive rates for transport circuit elements.¹¹ Record evidence shows that ILECs typically charge more for DS1 and DS3 services in Phase II areas than they do in areas subject to price caps, and this premium applies to both channel terminations and transport.¹² Indeed, as Sprint noted, the average premium it pays in Phase II price flex areas for DS1 and DS3 transport exceeds that for DS1 and DS3 channel terminations.¹³

Against these indicators of ILEC market power over transport services, there is no relevant evidence in the record to support the presence of sufficient competition for the provision of DS1 and DS3 interoffice transport between ILEC offices in *any* geographic market. As discussed in the rest of this section, the record lacks data on the existence and extent of actual competitive transport service providers in ILEC end offices or of potential entrants. The record

⁹ Reply of AT&T to Petitions to Reject or Suspend and Investigate Ameritech TN 1847, Pacific Bell TN 539, and Southwestern Bell TN 3428 (filed July 14, 2016).

¹⁰ *See id.*

¹¹ *See* Average Increase in ILEC Tariffed Rates for Channel Termination and Transport Circuit Elements in Phase II Areas, appended to Letter from Paul Margie, Counsel, Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 et al. (filed Nov. 9, 2016) (“Sprint 11/9/16 Ex Parte”).

¹² *See id.*

¹³ *See id.* at 5 (“[W]hile AT&T charges a Phase II premium of 2% to 8% for DS1 channel terminations offered at a 3-year term, it demands an 18% to 24% premium for DS1 transport elements—and the spread grows even wider for 5-year terms.”); *id.* (“CenturyLink’s premium for 3-year, DS1 channel terminations ranges from 21% to 25%, but jumps to roughly 42% for transport.”).

also does not provide the Commission with any relevant analysis of the barriers to entry that would prevent facilities-based entrants from collocating at ILEC end offices in order to provide competitive transport.

2. *Record Evidence Cited in the Second FNPRM Does Not Show Competition in the Interoffice Transport Market.*

The *Second FNPRM* relies on two claims for its conclusion that the interoffice transport market is sufficiently competitive to ensure just and reasonable prices and consumer protection: high-level statistics on the prevalence of competitive fiber cables and a general statement on the revenue potential of transport services as compared to channel terminations. Neither is relevant to, much less sufficient for, concluding that there is sufficient competition in the interoffice transport market.

The *Second FNPRM* cites data provided by AT&T on the existence of competitive fiber anywhere in a census block and within a certain distance from locations with BDS end-user demand.¹⁴ Even assuming that these statistics are useful as proxies for competition in channel terminations, they are not relevant to interoffice transport for several reasons. First, the distance between competitive fiber and a BDS customer's location is entirely irrelevant to the question of whether that customer has access to competitive transport facilities.¹⁵ By definition, interoffice transport carries traffic between ILEC end offices, not to and from a customer location. For the same reason, the *Second FNPRM*'s statistic on the percentage of census blocks with competitive fiber located anywhere in the block is also irrelevant, since it does not inform the Commission about the distances between the fiber and ILEC end offices.

¹⁴ See *Second FNPRM* ¶ 149.

¹⁵ See *id.* (stating that "92.1 percent of buildings served with BDS demand in price cap territories were within a half mile of competitive fiber transport facilities").

The *Second FNPRM*'s reliance on the number of competitive providers in a subset of large metro areas is likewise indefensible, as the presence of competitive facilities anywhere within an entire metro area does not imply that the markets for transport services everywhere in that MSA are competitive. The Commission has consistently recognized, including in the *BDS Order*, that MSAs are too large and varied to be a reliable geographic unit for which to assess competition.¹⁶ Yet without explanation, the *Second FNPRM* proposes to rely on such admittedly imprecise information to support nationwide deregulation.

Even if cable operators can effectively compete in BDS markets using their existing hybrid fiber-coaxial plant and can bypass ILEC end offices,¹⁷ that would still leave a significant portion of the country without any competitive transport options. Moreover, neither the *BDS Order* nor the *Second FNPRM* indicates the proportion of locations with BDS demand that are located within one-half mile of locations served by HFC facilities,¹⁸ though the percent of locations served by competitive HFC facilities is “less than five percent” of the total number of

¹⁶ See *BDS Order*, 32 FCC Rcd. at 3510 ¶ 114 (“We conclude that MSAs are not well suited to be used as the geographic area for determining competitive effects.”); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, FCC 12-92, 27 FCC Rcd. 10557, 10574 ¶ 36 (2012) (“*Suspension Order*”) (“Our review of the evidence suggests that demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA.”); see also Letter from John T. Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 4-7, WC Docket No. 16-143 et al. (filed Mar. 27, 2017) (“Windstream March 27 Ex Parte”).

¹⁷ See *Second FNPRM* ¶ 154 n.390.

¹⁸ The *BDS Order* notes only that “any test using the Form 477 data will likely overlap substantially with the locations already targeted by” the half-mile competitive fiber test. See *BDS Order*, 32 FCC Rcd. at 3526 ¶ 142.

collocations served by facilities-based providers.¹⁹ At a minimum, this raises doubts, even in counties deemed “competitive,” about the prevalence of HFC-based BDS providers that can self-provision transport and bypass entirely the need for interoffice transport between ILEC end offices.

Second, the statistics on competitive fiber mash together nationwide data, such that the largest and densest central business districts—which are in metro areas for which the Commission has already granted Phase II pricing flexibility—mask the lack of competition everywhere else. This shortcut compounds the error of relying on MSA-level data, and goes directly against the stated approach in the *BDS Order* to examine competition within “an appropriate geographic market” within which “consumers can practically turn for alternative sources, and within which providers can reasonably compete.”²⁰

Third, the statement that transport services “are typically higher volume services... which can more easily justify competitive investment and deployment”²¹ is too generalized to offer any evidentiary support for deregulating DS1 and DS3 interoffice transport in particular. These specific services, which are the actual target of Commission action, are by definition lower capacity and cover shorter distances within an ILEC’s network.²² In addition, the greater potential *capacity* of interoffice facilities does not guarantee greater potential *revenue* sufficient

¹⁹ *BDS Order*, 32 FCC Rcd. at 3520 ¶ 132 n.401 (“While the vast majority of these locations are served by competitive fiber facilities, a small percentage (i.e., less than five percent) are served by competitors by other means (e.g., HFC, fixed wireless).”).

²⁰ *BDS Order*, 32 FCC Rcd. at 3479 ¶ 39 (internal quotation marks omitted).

²¹ *Id.* 32 FCC Rcd. at 3495 ¶ 77.

²² See Sprint 11/9/16 Ex Parte at 2 (noting that interoffice transport services do not include “direct-trunked transport facilities that are commonly referred to as ‘dedicated transport’” or “backbone or long-haul transit links that represent the bulk of competitive providers’ fiber networks”).

to support competitive buildout, which depends entirely on the number of customers that demand DS1 or DS3 services. Indeed, the demand for DS1 or DS3 interoffice transport implies end users are purchasing only lower bandwidth services, which do not generate enough revenue to support competitive deployment.²³

The *Second FNPRM*'s generalized statement overlooks the realities in lower-demand transport routes where DS1 and DS3 interoffice transport are often “the only way that small and medium-sized businesses, governments, and health care institutions can obtain the quality data services that they need to operate,” but where providers struggle to justify investment and deployment costs.²⁴ BDS purchasers in practice “must commit to very substantial minimum revenue requirements” to offset ILECs’ high prices for channel terminations,²⁵ such that also purchasing ILEC transport is the only way to achieve those minimum levels. As a result, competitive transport providers in these markets have fewer revenue sources to support the cost of deployment. Thus, it is not surprising that competitive providers in the record find that “when one or both endpoints” on an interoffice transport route fall outside of high-density, high-demand “[central business districts] and first ring of suburbs...the availability of competitive transport falls off dramatically,” often leaving the ILEC as “the only choice for interoffice transport.”²⁶

²³ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd. 16978, 17196 ¶ 320 (2003) (recognizing the “the inability [of competitive providers] to recover [construction] costs at a single DS3 level results in impairment”).

²⁴ See Windstream March 27 Ex Parte at 1, 11, 16-21.

²⁵ Sprint 11/9/16 Ex Parte at 4.

²⁶ Declaration of Michael Chambless ¶10, appended to Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 05-25, RM-10593 (filed Jan. 27, 2016); see *BDS Order*, 32 FCC Rcd. at 3497 ¶ 80.

3. *The Record Is Devoid of Evidence that Competitive Providers Can Overcome Barriers to Entry for Collocating in ILEC End Offices.*

As the Commission correctly recognized in the *BDS Order*, “[m]arket analysis is incomplete without an evaluation of entry barriers.”²⁷ A proper analysis of barriers to entry takes into consideration the likelihood, timeliness, and sufficiency of additional entrants.²⁸ The need to analyze carefully evidence of entry barriers applies equally to the markets for interoffice transport. In order to offer an alternative to ILEC’s interoffice transport service, a competitive provider must have a sufficient number of suitably located interconnection points between its own network and the ILEC’s end offices.²⁹ This in turn requires that a competitive provider “has collocated in the ILEC end office where the channel termination is located, and that competitor can obtain a cross-connect to connect its collocated equipment to the ILEC channel termination.”³⁰ However, the record does not include any evidence that competitive providers can overcome the barriers to entry for collocating their facilities and equipment in ILEC end offices. Given the ILECs’ dominant share of DS1 and DS3 revenue, including interoffice transport elements, as shown in Dr. Rysman’s and others’ analyses, there is no basis for assuming that the entry barriers are trivial.

The potential availability of carrier-neutral facilities in some, unspecified, locations also does not save the *BDS Order*’s transport market analysis,³¹ which the *Second FNPRM*

²⁷ *BDS Order*, 32 FCC Rcd. at 3483 ¶ 49.

²⁸ *See id.* at 3483-85 ¶¶ 50-54.

²⁹ Letter from Paul Margie, Counsel, Sprint Corp., and John T. Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 8 n.37, WC Docket No. 16-143 et al. (filed Apr. 17, 2017) (“Sprint-Windstream 4/17/17 Ex Parte”).

³⁰ Windstream March 27 Ex Parte at 24-25; Sprint-Windstream 4/17/17 Ex Parte at 8.

³¹ *See BDS Order*, 32 FCC Rcd. at 3497 ¶ 81 & n.273.

incorporates by reference, from being woefully “incomplete.”³² The record fails to present evidence of the prevalence of actual, feasible alternative traffic “hand-off point[s]” to enable competitive providers to bypass ILEC end offices altogether.³³ Although the *Second FNPRM* states that cable operators self-provision transport for their BDS customers, neither the *BDS Order* nor the *Second FNPRM* indicates how many counties have extensive existing cable operator facilities such that they would be deemed competitive under the Form 477 prong of the competitive market test alone. More fundamentally, carrier-neutral collocation facilities and cable operators’ networks do not affect the barriers to providing competitive transport for end-user traffic that terminates at an ILEC end office, which necessarily requires collocating at that end office. Indeed, the data collection upon which the Commission based its conclusion in the *BDS Order* expressly *excluded* data on the prevalence of non-ILEC collocation facilities.³⁴

B. Nationwide Deregulation of DSn Transport Would Undermine Competition and Consumer Protection in BDS Markets that Are Not Competitive Even Under the Commission’s Own Competitive Market Test.

Nationwide deregulation of interoffice transport services would create a massive loophole in the framework adopted in the *BDS Order* and directly conflict with the Commission’s goals of protecting consumers and competition in markets without sufficient facilities-based competition

³² *Id.*, 32 FCC Rcd. at 3483 ¶ 49.

³³ Sprint-Windstream 4/17/17 Ex Parte at 8 (“AT&T acknowledges that competitive providers that are not collocated at an incumbent’s end office closest to the customer would need to ‘accept[] that traffic from a different hand-off point.’”).

³⁴ See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, 27 FCC Rcd. 16318, 16360 Appendix. A (2012) (“The definition of Collocation excludes Competitive Providers that collocate in carrier hotels.” (emphasis omitted)).

for channel terminations.³⁵ Deregulating pricing for transport services nationwide eliminates the effect of price caps on channel terminations in those counties that are deemed not competitive even under the Commission's own unrealistically optimistic competitive market test. As Sprint has explained in the record, deregulating transport means that the ILECs simply would be able to raise DS1 and DS3 transport prices to offset the effect of remaining price caps for channel terminations.³⁶

The results of the Commission's competitive market test for channel terminations also preclude a rational finding of effective competition for interoffice transport on a nationwide basis. In the counties that are deemed non-competitive under that test, BDS customers lack competitive options for facilities-based providers at their locations, and the ILEC's facilities that connect to these customer locations necessarily terminate at ILEC end offices. Potential competitive transport providers would have to justify building interoffice facilities, collocating at ILEC end offices, and cross-connecting to ILEC channel terminations, even though they do not have any sunk investments nearby that can be extended. Moreover, these non-competitive counties are most likely to be areas with revenue hurdles that are the most difficult to clear given the business density.

C. At a Minimum, the Commission Should Develop and Apply a Competitive Market Test for DSn Transport Services.

The stark differences between competitive conditions across different geographies, driven by differences in cost and demand, make a uniform, nationwide regulatory approach unsupportable. Even within a metropolitan statistical area, the presence of competitive transport

³⁵ See *Second FNPRM* ¶¶ 31, 154; *BDS Order*, 32 FCC Rcd. at 3462 ¶ 4.

³⁶ See Sprint 11/9/16 Ex Parte at 5.

providers in one corner does not imply that those providers can offer service in another corner. For example, the Washington, D.C.-area MSA includes both the dense urban core of the District of Columbia as well as rural counties between the Pennsylvania border in the north, and rural Spotsylvania County, Virginia in the south.³⁷ Instead of repeating the mistake in the *BDS Order* that was vacated on judicial review, the Commission should further develop the record and propose a competitive market test for DS1 and DS3 interoffice transport services in order “to ensure that counties [it] deregulate[s]... will be predominantly competitive in nature.”³⁸ Having concluded that it is necessary for any competitive market test to “closely approximate the realities of competition in the business data services market,”³⁹ it would be irrational for the Commission now to ignore that same need for interoffice transport.

The competitive market test for transport should be distinct from that used for channel termination given the differences between the two types of services. As discussed above, the relevant geographic market is the route between two ILEC end offices, and not the area within a given distance from a customer’s location. The distance between existing fiber and a customer location is irrelevant for measuring the cost of providing the BDS customer with competitive transport because the distance between the end office that serves the end-user location, and the end office where a transport facility might interconnect with a competitor’s network, could be and often is dramatically greater. Nor is reliance on the number of competitive providers within an MSA, rather than within the specific transport route, the relevant geographic unit to assess competition. The Commission should develop and apply a competitive market test that relies on

³⁷ See Sprint-Windstream 4/17/18 Ex Parte at 7-8.

³⁸ *BDS Order*, 32 FCC Rcd. at 3526 ¶ 142.

³⁹ *Id.* at 3519 ¶ 131.

actual indicators of transport competition within the appropriate geographic unit, including the relevant distance between the competitive fiber and the ILEC end office.

III. CONCLUSION

For the foregoing reasons, the Commission should not grant nationwide forbearance from the ex-ante pricing regulations of price cap carriers' TDM transport services. At minimum, the Commission should develop and propose a competitive market test that incorporates the appropriate relevant factors for assessing transport competition before taking any action that would raise prices.

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